No. 90-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
AND PROGRESSIVE FARMER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

After respondents[1] submitted their briefs in opposition, the Iowa Supreme Court issued its decision in *Hearst Corp.* v. *Iowa Dept. of Revenue and Finance*, No. 268/89-1863 (Iowa, Sept. 19, 1990).[2] In his reply brief, petitioner characterizes the Iowa decision as one in direct conflict with the instant Tennessee decisions which compels the granting of the petition in this case. Respondents submit this supplemental brief, pursuant to Rule 15.7 of this Court's rules, to address the Iowa decision and the misreliance placed upon it by petitioner in his reply brief.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE IOWA SUPREME COURT IN *HEARST* AND THE DECISIONS OF THE TENNESSEE SUPREME COURT IN THE PRESENT CASES.

[1] The statements required by Rule 29.1 of this Court's rules are set forth in respondents' respective briefs in opposition: "Brief in Opposition of Newsweek, Inc.," at i; "Brief in Opposition of Respondents, Southern Living, Inc. and Progressive Farmer, Inc.," at ii.

[2] The decision is reproduced as the Appendix to petitioner's "Reply to Briefs in Opposition," and is cited as "Reply App. at ."

There is a fundamental, outcome-determinative difference between the decisions of the Court below and the *Hearst* decision. The Court below found, as it was compelled to do both from the face of the applicable Tennessee regulations and from the undisputed facts in the record before it, that Tennessee's tax scheme, which exempts "newspapers" but not magazines, involved content-based discrimination.[3] Content-based discrimination, absent a compelling state interest, is unconstitutional. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987).

In contrast, the court in *Hearst* found that "the form and frequency of the publication are the primary factors for determining whether a publication qualifies for the Iowa sales and use tax exemption." (Reply App. at 16)[4] The *Hearst* court went on to find that "[t]he Iowa law does not scrutinize the content. . . ." "Because the form of publication is a noncontent-based consideration, the Iowa statute complies with the standards set forth by the Supreme Court in *Arkansas Writers' Project.*" (Reply App. at 16)

Thus, the different results in these decisions from two different states flow from differences in the kind of tax discrimination under examination.

Ignoring the stark differences between the two decisions, petitioner nevertheless asserts that "[t]he court of last resort of the State of Iowa has decided precisely the issue presented by the petitioner here in a way that directly conflicts with the Tennessee Supreme Court's decisions in these cases." (Reply at 1) When the different circumstances of the cases are properly taken into account, it is clear that there is no conflict—direct or otherwise.

Petitioner's attempt to conjure up a conflict not only ignores the important differences in the Iowa and Tennessee decisions, but also ignores the underlying differences in the tax schemes of the two states.

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[3] Nowhere in its petition did petitioner challenge this finding.

[4] The record before the Tennessee courts expressly negates any reliance by petitioner upon either form or frequency in making his determination of which publications are newspapers.

The Iowa statute, on its face, is content-neutral. (Reply App. at 6-7) More importantly for this proceeding, Iowa had no regulatory definition of the term "newspaper" for much of the audit period.[5] The Iowa court was obligated to define the statutory term "newspaper" for a period when neither the court nor a taxpayer could resort to a regulatory definition.

Petitioner here observes that the Tennessee tax statute is also content-neutral (Reply at 7) and concludes without more that the Iowa and Tennessee decisions are therefore in direct conflict. This conclusion ignores the fact that Tennessee, unlike Iowa, had a tax rule defining "newspaper" which was applicable for the entire period and which included a content-based component.

Petitioner chastises the Tennessee Supreme Court for its failure to be guided by common usage. Citing the discussion in *Hearst* of the common usage of the term "newspaper," petitioner warns that "if the term 'newspaper' were construed as being inherently content-based, and thus constitutionally suspect, the validity of numerous other laws... would be called into serious question." (Reply at 6).

The Tennessee Supreme Court was not called upon to "construe" the term "newspaper." The Tennessee Supreme Court was required to do what those potentially subject to the tax must do—read the regulatory definition of "newspaper." It observed that exemption from the tax depends upon the content of the publication. Were "common" usage alone a sufficient guide, the Tennessee tax authorities doubtless would have found it unnecessary to *define* the term "newspaper" in their regulations.[6]

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[5] The audit period is October 1, 1978 through December 31, 1982. (Reply App. at 3) "Newspaper" was not defined by Iowa tax rules until January 28, 1981. (Reply App. at 7)

[6] Whether, in the absence of a definition provided by the state, a court might construe the term "newspaper" as "inherently content based" is irrelevant to the present case. See Reply at 6. Nevertheless, the Tennessee Supreme Court has held that the Tennessee regulatory definition, including its content-based requirement, is "in accord with the generally accepted usage of the term 'newspaper.' " *Shoppers Guide Publishing Co.* v. *Woods*, 547 S.W.2d 561, 563 (Tenn. 1977).

Whether the Iowa Supreme Court arguably has addressed the issue reserved by this Court in *Arkansas Writers'*—"whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." 481 U.S. at 233—does not provide any basis for granting the instant petition. Properly, the Tennessee Supreme Court did not address that issue since, on the facts before it, *Arkansas Writers'* was clearly controlling. This petition is an inappropriate vehicle by which to review the Iowa decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondents' briefs in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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